

SECOND ADDENDUM
RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 93-0195

MAR 04 1999

COUNSEL: NONE

HEARING DESIRED:

APPLICANT REQUESTS THAT:

He be returned to active duty, with promotion to the grade of master sergeant, with backpay and service credit for the period following his discharge up to his return to active duty.

By letter, dated 12 September 1997, applicant requests that, in the alternative, he be retired (Exhibit P).

RESUME OF CASE:

The applicant is a former servicemember who was honorably discharged on 6 June 1989, under the provisions of AFR 35-4 (Disability - Entitled to Severance Pay), with a 20% disability rating. Applicant's DD Form 214, Certificate of Release or Discharge from Active Duty, reflects that, at the time of his discharge, he was credited with 15 years, 8 months, and 6 days of active Federal service.

On 17 November 1994, the Board considered and denied applicant's request that he be returned to active duty in the grade of master sergeant, with service credit for the period following his discharge up to his return to active duty (Exhibits A through H).

In an undated letter addressed to the Secretary of the Air Force, applicant requested that he be returned to active duty. His letter was forwarded to the AFBCMR as a matter coming under its purview and was processed as a request for reconsideration of his appeal (Exhibit I). On 31 October 1995, after reviewing the documentation provided with applicant's request for reconsideration, the Board was not persuaded that the finding of unfitness, at the time of the applicant's discharge, was improper or contrary to the governing regulation. Accordingly, the Board again denied the applicant's appeal (see Addendum to the Record of Proceedings).

On 3 December 1996, applicant wrote to the Secretary of the Air Force requesting that she direct/permit him to return to active duty. He provided a copy of his AFBCMR appeal package for the Secretary's review. His request was forwarded to the AFBCMR for appropriate response. On 12 December 1996, the Assistant Secretary

of the Air Force for Manpower, Reserve Affairs, Installations and Environment (SAF/MI) advised applicant that he had reviewed all of the circumstances of the case and did not find the decision of the AFBCMR inconsistent with the evidence submitted and of record. He was further advised that while he may be physically qualified for civilian employment, this did not mean that he was physically qualified for worldwide duty and enlistment in the Regular Air Force. (See Exhibit J.)

On 13 January 1997, applicant submitted another appeal to SAF/MI requesting reconsideration of his appeal. The request was reviewed by the AFBCMR staff and, on 30 January 1997, applicant was advised that his request did not meet the criteria for reconsideration (Exhibit K).

By letter dated 27 May 1997, applicant again wrote to the Secretary of the Air Force requesting reconsideration of his appeal. Included in his request were copies of his previous correspondences, with the responses from SAF/MI, and a statement from the senior medical officer, Branch Medical Clinic, Concord, CA, dated 22 April 1997. (Exhibit L)

APPLICANT CONTENDS THAT:

He is medically fit for full military duty as evidenced by the 22 April 1997 letter from the Senior Medical Officer for the Concord Naval Weapons Station (copy appended to Exhibit L). He is also deserving of the extra relief requested in his application; i.e., promotion to master sergeant, backpay, and time credit.

STATEMENT OF FACTS:

The relevant facts pertaining to this application, extracted from the applicant's military records, are contained in the Statement of Facts section of the original Record of Proceedings. Accordingly, there is no need to recite these facts in this Record of Proceedings.

ADDITIONAL AIR FORCE EVALUATION:

The AFBCMR Medical Consultant reviewed the 22 April 1997 statement provided by the Branch Medical Clinic at Naval Weapons Station, and opined that it is not sufficient to warrant approval of applicant's request. The Medical Consultant stated that the statement was apparently based on an occupational physical examination performed in March 1995. He stated that a call to the clinic did not provide any additional substantive information. He stated he pointed out to the doctor at the clinic that the letter

supplied by the clinic was insufficient to justify applicant's return to active duty based on the physical examination of 1995 which did not address the underlying condition that led to his separation in the first place, the somatoform nature of his disqualifying pain syndrome. (Exhibit M)

By letter, dated 10 September 1997, the Senior Medical Officer, Branch Medical Clinic Concord, stated that all pertinent information was not given to the health care providers when evaluating applicant's fitness for duty on 22 April 1997. He further recommended that applicant not be made fit for duty until review of past MRI and determination, preferably by further VA exam/MRI, that his status as 20% disabled is no longer applicable. The complete statement is at Exhibit N.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION:

By letter, dated 12 September 1997, Major General B---, USAFR, Retired, responded in applicant's behalf to the additional advisory opinion, stating applicant should be restored to active duty, at increased rank, and permitted to continue his Air Force career. General B--- requests that the Board accept the Navy's conclusion that applicant is fit for full duty and direct his return to active duty.

The response, with attachments, is at Exhibit P.

By letter, dated 17 February 1998, Maj Gen B--- provided a statement from applicant stating that a report of his medical condition from the 60th Medical Group at Travis AFB, [REDACTED] will indicate that he is in excellent condition - and more importantly, that he is worldwide qualified. (Exhibit R)

Under separation cover, a report of medical examination, dated 15 January 1998, was received from the 60th Medical Support Squadron indicating applicant is qualified for worldwide duty. (Exhibit S)

By letter, dated 8 July 1998, copies of correspondence from applicant's children to The Judge Advocate General, were forwarded for inclusion in applicant's case file (Exhibit T).

By letter, dated 20 August 1998, applicant's former area defense counsel provided additional comments in applicant's behalf. Included with the statement was documentation associated with the applicant's court-martial action, which was subsequently set aside. (Exhibit U)

A letter was received in applicant's behalf from the 60AMW/IG (Exhibit V).

By letter, dated 8 October 1998, applicant's former area defense counsel provided additional comments regarding the court-martial conviction which was set aside. (Exhibit W)

THE BOARD CONCLUDES THAT:

We have carefully considered the applicant's previous submissions, as well as his most recent submission, including the subsequent medical opinions and statements provided on the applicant's behalf. However, we are not persuaded that his medical discharge was either improper or contrary to the governing regulation, which implements the law. The subsequent medical opinions suggest that the applicant is now medically qualified for worldwide duty. However, we found that no evidence has been presented showing that, at the time of his separation, the diagnoses made by competent medical authority, and the subsequent finding of unfitness, were improper or based on erroneous information. In view of the foregoing, and absent persuasive evidence showing that the original medical diagnoses, which led to the applicant's medical discharge, were in error or unjust, we conclude that there is no basis upon which to recommend favorable action on his request for return to active duty. In addition, we found no evidence that the applicant met the eligibility criteria for retirement. Accordingly, his alternate request that he be retired is not favorably considered.

THE BOARD DETERMINES THAT:

The applicant be notified that the evidence presented did not demonstrate the existence of probable material error or injustice; that the application was denied without a personal appearance; and that the application will only be reconsidered upon the submission of newly discovered relevant evidence not considered with this application.


The following members of the Board considered this application in Executive Session on 20 October 1998, under the provisions of AFI 36-2603:

Mr. David C. Van Gasbeck, Panel Chair
Mr. Richard A. Peterson, Member
Mr. Jackson A. Hauslein, Member

The following additional documentary evidence was considered:

- Exhibit J. Applicant's Ltr to SAF, dated 3 Dec 96; SAF/MI Ltr to Applicant, dated 12 Dec 96.
- Exhibit K. Applicant's Ltr to SAF/MI, dated 13 Jan 97, w/atchs; SAF/MI Ltr to Applicant, dated 30 Jan 97.

Exhibit L. Applicant's Ltr to SAF, dated 27 May 97, w/atchs.
Exhibit M. Ltr, BCMR Medical Consultant, dtd 14 Aug 97.
Exhibit N. Ltr, AFBCMR, dated 18 Aug 97.
Exhibit O. Memo fr Sr Med Officer, Branch Med Clinic Concord,
dated 10 Sep 97, w/Memo, dated 22 Apr 97.
Exhibit P. Ltr fr MGen Baumler to SAF, dated 12 Sep 97,
w/atchs.
Exhibit Q. Ltr, AFBCMR, dated 5 Dec 97.
Exhibit R. Ltr fr MGen Baumler, dated 17 Feb 98, w/atchs.
Exhibit S. SF Fm 88, dated 15 Jan 98; SF 93, dated 15 Jan 98;
Memo fr 60 MDSS/SGST, dated 18 Feb 98, w/atch.
Exhibit T. Ltr, AFLSA/JAJM, dtd 8 Jul 98, w/Ltr fr Applicant's
children.
Exhibit U. Ltr fr Applicant's former Area Defense Counsel
(ADC), dated 20 Aug 98, w/atchs.
Exhibit V. Ltr fr 60AMW/IG, dated 7 Oct 98, w/atch.
Exhibit W. Ltr fr Applicant's former ADC, dtd 8 Oct 98,
w/atch.



DAVID C. VAN GASBECK
Panel Chair

In addition to documentation .that was previously reviewed by the Board, applicant provided copies of a Report of Medical History and a Certificate of Medical Examination associated with his civilian employment. (Exhibit I)

THE BOARD CONCLUDES THAT

We noted the documents provided with applicant's most recent submission, including the medical documents associated with his civilian employment. However, these documents did not convince us that the finding of unfitness, at the time of applicant's discharge, was improper or contrary to the governing regulation, which implements the law. Nor did we find any evidence showing that the finding of unfitness was based on erroneous information. Based on the foregoing, and in the absence of persuasive evidence that applicant's discharge was improper or contrary to the governing law, we are unpersuaded that a revision of our earlier determination is warranted.

THE BOARD DETERMINES THAT:

The applicant be notified that the evidence presented did not demonstrate the existence of probable material error or injustice; that the application was denied without a personal appearance; and that the application will only be reconsidered upon the submission of newly discovered relevant evidence not considered with this application.

The following members of the Board reconsidered this application under the provisions of AFR 31-3:

LeRoy T. Baseman, Panel Chairman
Abner C. Young, Member
David W. Mulgrew, Member

The following additional documentary evidence was considered:

Exhibit I. Applicant's undtd Ltr to Secretary of the Air Force, w/atchs.



LEROY T. BASEMAN
Panel Chairman

EC 93-01958

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 93-01958

COUNSEL: NONE

APR 27 1995

HEARING DESIRED: NO

APPLICANT REQUESTS THAT:

He be returned to active duty in the grade of Master Sergeant, with service credit for the period following his discharge up to his return to active duty.

The court-martial conviction be removed from his records and that he be given restitution of all pay and benefits he forfeited.

APPLICANT CONTENDS THAT:

His medical discharge was a direct result of a court-martial proceeding which resulted in a finding of guilty but was subsequently vacated when The Judge Advocate General of the Air Force established there had been error prejudicial to his substantial rights.

In support of his request, applicant provided his expanded comments outlining the events surrounding his court-martial and subsequent medical discharge. He also provided copies of the orders vacating the findings and sentence of the court-martial, copies of correspondence to/from his congressman, a statement in his behalf from his legal counsel at the time of his medical separation, and documentation pertaining to his post-service employment. His complete submission is at Exhibit A.

STATEMENT OF FACTS:

Applicant enlisted in the Regular Air Force on 3 October 1980 for a period of four years, in the grade of Staff Sergeant. He reenlisted on 3 July 1984 for a period of four years, and again on 5 May 1987 for a period of six years. He had 7 years and 2 days of prior active service in the Regular Air Force, and 2 years, 5 months and six days of prior active/inactive service in the Air Force Reserve. His highest grade held was Staff Sergeant. On 6 June 1989, he was honorably discharged under the provisions of AFR 35-4 (Disability-Entitled to Severance Pay), with a 20% disability rating, in the grade of Senior Airman. On 25 March 1994, his DD Form 214 (Certificate of Release or

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Discharge from Active Duty) was administratively corrected by the Air Force Military Personnel Center (AFMPC) to reflect the grade of Staff Sergeant at the time of discharge.

A resume of applicant's APRs subsequent to his 3 October 1980 enlistment follows:

<u>PERIOD CLOSING</u>	<u>OVERALL EVALUATION</u>
12 Feb 81	9
17 Jul 81	9
17 Jul 82	9
17 Jul 83	9
17 Jul 84	8
9 Dec 84	7
16 Oct 85	7 (Referral)
16 Oct 86	8 (w/LOE)
2 Jul 87	8
13 Jun 88	7 (Referral)

The records reflect that, on 27 April 1988, applicant received nonjudicial punishment under the provisions of Article 15, Uniform Code of Military Justice (UCMJ), for failure to go at the time prescribed to his appointed place of duty on or about 18 and 19 April 1988. Punishment consisted of a suspended reduction in grade from Staff Sergeant to Sergeant (reduction suspended until 26 October 1988).

Applicant was tried by Special Court-Martial and found guilty of filing a false and fraudulent claim on or about 21 January 1988. The sentence adjudged on 3 September 1988 consisted of reduction in grade from Staff Sergeant to Sergeant and forfeitures of \$75 per month for six months. The sentence was approved on 22 November 1988. Per Special Court-Martial Order No. 2, dated 15 July 1991, The Judge Advocate General ordered that the findings and sentence of applicant's court-martial be vacated, that the charges be dismissed, and all rights and privileges be restored.

The following chronology of events leading to applicant's medical discharge was obtained from a copy of his service medical records provided by the VA.

On 21 October 1988, a Medical Evaluation Board (MEB) convened and established the following diagnoses: Neck pain, low back pain, headaches, and pain and paresthesias of bilateral arms and legs. **Axis I** somatoform pain disorder. Approximate date of origin - June 1980. The MEB recommended the case be referred to the Physical Evaluation Board (PEB).

On 8 December 1988, the Informal PEB reviewed the case and recommended the applicant be discharged with severance pay, with a disability rating of 10%, for somatoform pain disorder characterized by multiple musculoskeletal complaints with

moderate social and industrial impairment. On 28 December 1988, applicant disagreed with the findings and recommended disposition of the Informal PEB and demanded a formal hearing.

On 30 January 1989, applicant appeared and testified before the Formal PEB. He also presented two statements for the Board's review. Recommended disposition in the case was discharge with severance pay, with a disability rating of 20%. The diagnoses were: (1) Somatoform pain disorder characterized by multiple musculoskeletal complaints with moderate social and industrial impairment; (2) Evidence of HNP at L5/S1 level, right side, and degenerative disc disease, **but** without root compression symptomatology. Other diagnoses considered but not ratable: History of alcohol abuse, treated, 1974; inadequate personality; status post hand surgery (right) for repair of laceration; high serum cholesterol; high frequency loss, A.U. On 30 January 1989, applicant did not agree with the findings and recommended disposition of the Formal PEB.

On 13 March 1989, the Secretary of the Air Force directed applicant's discharge with severance pay, with a disability rating of 20%. It was **also** determined that applicant did serve satisfactorily in the higher **grade** of Staff Sergeant.

AIR STAFF EVALUATION:

The Military Justice Division, AFLSA/JAJM, stated that the applicant had been convicted of filing a false claim for damaged household goods. Upon appellate review, the charge was found deficient and the conviction was set aside.

The court-martial action taken against the applicant has been set aside and the order indicates that "All rights, privileges, and property of which the accused has been deprived by virtue of the findings of guilty and the sentence so vacated will be restored." Whether this extends to speculative promotions to Technical Sergeant and Master Sergeant is beyond the purview and expertise of JAJM. (Exhibit C)

The Directorate of Medical Service Officer Management, AFMPC/DPMMMR, reviewed this application and opined that no change in the records, insofar as it applies to the medical record, is warranted and the application should be denied.

DPMMMR stated applicant **was** found unfit and discharged with entitlement to disability severance pay because of (1) somatoform pain disorder characterized by multiple musculoskeletal complaints with moderate social and industrial impairment; (2) evidence of HNP at L5/S1 level, right side, and degenerative disc disease, but without root compression symptomatology 20% ratable under diagnostic code 9505 and 5293; other diagnoses considered but not ratable: history of alcohol abuse, treated, 1974;

inadequate personality; status post hand surgery (right) for repair of laceration; high serum cholesterol; high frequency loss, A.U. The applicant was, apparently, found guilty in a Special Court-Martial on 3 September 1988. He was then airevaced to Wiesbaden for Medical Evaluation Board (MEB) processing and evaluation by psychiatry, neurology, ENT and Internal Medicine. On 21 October 1988, the MEB referred the case to the Physical Evaluation Board (PEB). At no time do the records reveal any mention of a court-martial. There is no indication the medical discharge was a result of a court-martial and absolutely no indication the MEB was influenced by the court-martial.

On 27 September 1988, applicant's commander wrote a letter to the MEB requesting that he be cross-trained or medically discharged because of being on a profile for 198 of 270 days which prevented him from doing his job.

The complete AFMPC/DPMMMR evaluation is at Exhibit D.

The Chief, USAF Physical Disability Division, AFMPC/DPMAD, recommended no change to the record, stating the disability case was correctly adjudicated and the applicant was appropriately compensated under the provisions of Title 10, USC, Chapter 61. Medical documentation presented substantiates the applicant was unfit for continued military service. Vacation of the court-martial conviction did not affect the applicant's evaluation or right to a full and fair hearing within the Air Force disability system.

DPMAD stated that an MEB, conducted in October 1988, questioned the applicant's medical qualification for worldwide duty by reason of neck pain, low back pain, headaches, and pain and paresthesias of bilateral arms and legs. Medical documentation substantiates the applicant had a long history of chronic neck and back pain relating to a fall in June 1980 which was incurred in the line of duty. He received physical therapy treatments and medication on and off since June 1980. Prior to his assignment in September 1987, he was receiving medication and therapy treatments for chronic neck pain and muscle contraction headaches.

DPMAD noted that in the formal hearing proceedings applicant's counsel entered into record two exhibits signed by the applicant, a letter to President Reagan and a statement subject to the facts of the case. The President of the PEB indicated that the exhibits pertained mainly to the court-martial case. He stated such exhibits are not normally admitted because cases presented to the PEB are medical cases. The board agreed to allow the recording of these exhibits only because they contained some information relating to the applicant's medical condition. At no time during the formal proceedings was the member's court-martial case discussed.

The complete DPMAD evaluation is at Exhibit E.

The Airman Promotions Branch, AFMPC/DPMAJW1, recommended denial of applicant's request for a promotion to Master Sergeant. Although the applicant's Special Court-Martial was set aside, the fact he was found unfit for continued military service rendered him ineligible for any further promotion consideration. Unless the Board determines the applicant's discharge with severance pay is unjust, and returns him to active duty, he will not be eligible for any promotion consideration. (Exhibit F).

APPLICANT'S REVIEW OF AIR STAFF EVALUATION:

Applicant stated the advisories have focused on only one aspect of the board's purpose, and that is whether there was an error in the medical proceedings. He stated the reason he applied to the Board was not to dispute irregularities in the medical proceedings but to request a review of the injustice which led up to, and directly brought about the medical proceedings; i.e., the court-martial which has now been reversed. He offered comments addressing specific issues in each of the advisories.

Applicant's complete response is at Exhibit H.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.
2. The application was timely filed.
3. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. After a thorough review of the applicant's complete submission, the Board was not convinced that he has been the victim of an error or injustice. Once the determination was made by competent military medical authority that applicant's medical condition made his continued service questionable, his case was properly referred for disability processing, in accordance with the governing regulation, which implements the law, to determine the issue of unfitness. After a review of all of the evidence, including the applicant's testimony, the Physical Evaluation Board found the applicant unfit for continued military service because of physical disability, and on that basis, recommended his discharge with entitlement to disability severance pay. We noted applicant's contention that his medical discharge was a direct result of his court-martial. However, while the events surrounding his court-martial proceedings may have exacerbated his medical condition, the available evidence of record reflects that he had a long history of chronic neck and back pain relating to a fall in June 1980, which was incurred in the line of duty,

and that he had received physical therapy treatments and medication on and off since June 1980. Once a member is found unfit to perform the duties of his office, rank, or grade by reason of physical disability, the law governing disabilities requires that the member be separated. The applicant has not provided any evidence showing that his rights to due process were violated during the disability processing, that he was improperly evaluated, or that the final diagnoses by the PEB were erroneous. In addition, we noted that subsequent to his discharge, evaluation by the Veterans Administration (VA) resulted in the same diagnoses and ratings as rendered by the Air Force. In view of the foregoing, and in the absence of substantial evidence that applicant's discharge was improper or contrary to law, we find no basis exists to overturn the decision of the PEB and recommend favorable action on his request that he be returned to active duty.

4. We noted applicant's request that the court-martial conviction be removed from his records. However, inasmuch as the court-martial action taken against the applicant has already been set aside, this is a moot issue.

THE BOARD DETERMINES THAT

The applicant be notified that the evidence presented did not demonstrate the existence of probable material error or injustice; that the application was denied without a personal appearance; and that the application will only be reconsidered upon the submission of newly discovered relevant evidence not considered with this application.

The following members of the Board considered this application in Executive Session on 17 November 1994, under the provisions of AFR 31-3:

LeRoy T. Baseman, Panel Chairman
Abner C. Young, Member
David W. Mulgrew, Member

The following documentary evidence was considered:

Exhibit A. DD Form 149, dated 25 Dec 92, w/atchs.
Exhibit B. Applicant's Master Personnel Records.

Exhibit C. Letter, AFLSA/JAJM, dated 14 Jun 93.
Exhibit D. Letter, AFMPC/DPMMMR, dated 25 Jan 94.
Exhibit E. Letter, AFMPC/DPMAD, dated 11 Feb 94.
Exhibit F. Letter, AFMPC/DPMAJW1, dated 8 Mar 94.
Exhibit G. Letter, AFBCMR, dated 14 Apr 94.
Exhibit H. Letter, Applicant, dated 2 May 94, w/atchs.


LEROY F. BASEMAN
Panel Chairman